square feet of the land belonging to the plaintiffs and that that occupation is unlawful.

The plaintiffs rely, *inter alia,* on the affidavit of a registered and licensed surveyor Kamaruddin bin Mat Yunus who as a result of a survey done by him was of the view that the wall had encroached onto lot No. 9280 to the extent of 513 square feet. The plaintiffs' contention is that in the face of the surveyor's finding there is nothing more to be said.

Encik Lim Kean Chye's arguments in support of the application has to have been based on the premise that Kamaruddin's survey was correctly and accurately done.

Encik C.V. Dass for the defence however raised questions suggesting that on the face of the survey plan exhibited to Kamaruddin's affidavit the correctness of the survey and its accuracy are questionable. It would seem that certain of the original boundary stones were missing and were replaced by new ones, perhaps by Kamaruddin, raising the not unreasonable and *bona fide* question whether the replacements were correctly placed and consequently whether the survey by Kamaruddin is accurate. Apart from that it may not be irrelevant for me to point out as I did in my judgment in Raub High Court Criminal Trial No. 1 of 1979 that —

"... the opinions or beliefs of third persons are, as a general rule, irrelevant and therefore inadmissible. It is the function of the Judge and Jury to form their own conclusion or opinion on the facts stated.

There are, however, cases in which the court is not in a position to form a correct judgment without the help of persons who have acquired special skill or experience on a particular subject. In such cases the help of experts is required and the rule is relaxed and expert evidence is admissible to enable the court to come to a proper decision. The rule admitting expert evidence provided by section 45 of the Evidence Act is founded on necessity.

It is the duty of the judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered an expert.

....

At page 656 of that authoritative book, *Archbold* Criminal Pleading, Evidence and Practice 38th Edition is paragraph 1356a which reads, 'the duty of experts is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. *Davie* v. *Edinburgh Magistrate* (1953) S.C. 34 at 40.'

The principle of course is that the responsibility for the determination of every question that arises in a case rests upon the court including a question upon which expert evidence is called."

In my view the challenge to the accuracy of the survey creates a triable issue as to the positioning of the boundaries of the two lots. And in any event I am not in a position to form an opinion of the boundaries without the surveyor explaining to me to my satisfaction as to why I should adopt his findings.

The defence also contends that even if there has been an encroachment onto lot 9280 in all the circumstances in equity the plaintiffs are estopped from complaining about it. Encik Lim Kean Chye's argument in respect of that contention is that the principles of equity have no bearing in a boundary dispute in a Torren's system of land registration. Sections 340(2) and 341 of the National Land Code were referred to me.

I do not think that the answer to that issue is as clear cut as that and in my view poses an interesting and perhaps difficult question of law that needs to be resolved which cannot properly be done without the court first appraising itself of the full facts (some of which are in dispute) that lead to the parties being in the unhappy situation that they find themselves in, which cannot be done on affidavit evidence.

In the circumstances the order of the court was that the application be dismissed with costs.

Application dismissed.

Solicitors: *Peter Lai & Co.; Shook Lin & Bok.*

GOVERNMENT OF MALAYSIA v. PRESTON CORPORATION (M) SDN. BHD.

[O.C.J. (Wan Hamzah J.) June 9, 1981]
[Kuala Lumpur — Civil Suit No. 850 of 1978]

Revenue Law — Income Tax — Penalty — Application for summary judgment — Whether taxpayer can raise defences and apply for leave to defend — When penalty treated as tax payable — Limitation — Limitation Ordinance, s. 6(4) — Income Tax Act, 1967, ss. 99, 102, 103, 106, 113 & 125.

In this case the plaintiff sued the defendant for a total sum of $105,911.85 made up of (a) 93,983.50 penalty and $9,328.35 increased penalty imposed in respect of the year of assessment 1971; (b) $3,000 penalty and $300 increased penalty in respect of the year of assessment 1974. The plaintiff applied for liberty to enter judgment and the defendant asked for unconditional leave to defend. The defendant contended (a) that the Director General could impose a penalty only if the conditions specified in section 113 of the Income Tax Act, 1967, existed and these conditions did not exist in this case; (b) the action was time barred under section 6(4) of the Limitation Ordinance.

Held: (1) by virtue of section 125(2) of the Income Tax Act, 1967, sections 103 to 106 of the Act are made applicable to penalties, in that penalties under section 113(2) of the Act are to be treated as tax payable:

(2) the defendant's contention that the penalty was incorrectly assessed could not therefore be entertained as section 106 of the Act precluded such a plea being entertained;

(3) Section 106(3) of the Income Tax Act, 1967, clearly provides that the court shall not entertain any plea that the amount sought to be recovered is incorrectly increased under section 103(4) of the Act;

(4) section 125(2) of the Income Tax Act being a specific provision introduced after the enactment of section 6(4) of the Limitation Ordinance, prevails over the general provision in section 6(4) of the Ordinance, so far as penalty under section 113(2) of the Income Tax Act is concerned;

(5) a contention that the assessment of tax was made out of time in contravention of section 91(1) of the Income Tax Act is a plea that the tax was incorrectly assessed and therefore could not be entertained under section 106(3) of the Act.

Case referred to:-

(1) *Government of Malaysia* v. *Ng Song Choon* [1975] 1 M.L.J. 131.

CIVIL SUIT.

Jaafar bin Mat Saman for the plaintiff.

R.R. Sethu for the defendant.

Wan Hamzah J.: The plaintiff sues the defendant for a total sum of $105,911.85. By this summons the

plaintiff applies for liberty to enter judgment on the ground that there is no defence to the action. The defendant opposes this application and asks for unconditional leave to defend. The sum claimed consists of amounts assessed under the Income Tax Act, 1967 in respect of the year of assessment 1971 and the year of assessment 1974.

In respect of the year of assessment 1971 the Director-General of Inland Revenue issued to the defendant notice of additional assessment dated July 27, 1974 in which a penalty of $93,983.50 was imposed under section 113(2) of the Act. The notice of additional assessment shows certain payments previously made by the defendant as the result of which there is a small credit. This credit being taken into account, demand is made in the notice of additional assessment for payment of $93,883.50 being the net amount of the section 113(2) penalty. Subsequently the defendant paid a sum of $600, leaving a balance of $93,283.50, but failed to pay the balance within 30 days after the service of the notice of additional assessment. Therefore when bringing this action the plaintiff includes in the claim a further sum of $9,328.35 being the amount of increase under section 103(4) of the Act.

In respect of the year of assessment 1974 the Director-General served on the defendant a notice of additional assessment dated September 14, 1974 wherein a demand was made for payment of a total sum of $134,206.95 consisting of section 113(2) penalty of $3,000 and the balance being tax. The defendant paid up the tax but not the penalty. Therefore the plaintiff sues the defendant for recovery of the penalty, and since the defendant had not paid the penalty within 30 days of the service of the notice of assessment the plaintiff also includes in its claim a further sum of $300 being the amount of increase under section 103(4).

The defendant contends that the Director-General can impose a penalty under section 113(2) only if the conditions specified in section 113 exist, and avers that in this case such conditions do not exist and therefore this issue should be tried before judgment can be entered. On the other hand the plaintiff contends that the section 113(2) penalty of $93,883.50 in respect of the year of assessment 1971 and $3,000 in respect of the year of assessment 1974 became due and payable on the service of the notices of additional assessment and it is not open to the defendant to raise in this suit the ground that the imposition of the penalty was wrong and not in accordance with the provisions of section 113. With this contention of the plaintiff I agree.

Section 125(2) provides —

"Any penalty imposed on any person under section 113(2) shall be collected as if it were part of the tax payable by that person, but shall not be treated as tax so payable for the purposes of any provision of this Act other than sections 103 to 106."

So section 103 applies to the section 113(2) penalty as if the penalty were tax. Section 103(2) provides: —

"Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be."

In the present case notices of the assessment of the penalty were served on the defendant and therefore the penalty has become due and payable on the service of the notice of assessment. Section 125(2) also makes it clear that section 106 applies to the penalty. Section 106 provides —

"(1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

(2) ....

(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4), (5) or (5A)."

The defendant's contention that the Director-General was wrong to impose the penalty under section 113(2) on the ground that the conditions stipulated in section 113 did not exist, is a plea that the penalty was incorrectly assessed and therefore such plea cannot be entertained in this suit. Since it is not open to the defendant to contest in this suit that the penalty was wrongly imposed, the question arises where and when it can do so. I have no doubt that it can do so by bringing an appeal to the Special Commissioners of Income Tax in accordance with section 99(1) which provides —

"A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving the Director-General ... a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form."

It should be noted that section 99(1) refers to "assessment" generally, and not specifically to "assessment of tax". The question may be asked whether the Director-General in fact "made an assessment" when he imposed the penalty. In my opinion there should not be any doubt as to this. The notices which were served on the defendant giving notification of the imposition of the penalty were notices of assessment in Form JA which is a form prescribed under section 152 of the Act. The prescribed form contains a column for penalty imposed under section 113(2). Therefore the imposition of the penalty is an assessment, and the assessment of penalty is subject to appeal to the Special Commissioners under section 99(1). So, in order to contest against the penalty the defendant should lodge an appeal to the Special Commissioners. If the Special Commissioners uphold the imposition of the penalty the defendant can appeal further to the High Court under paragraph 34 of Schedule 5 to the Act. It is only when a further appeal is brought to the High Court in this way that the High Court will have the jurisdiction to hear and decide on the question of whether the penalty has wrongly been imposed.

It appears from the defendant's affidavit that it has given to the Director-General notice of appeal against the assessment of the penalty but the Director-General has not forwarded it to the Special Commissioners. Section 102(2) provides —

"... if an appellant has complied to the best of his ability with all requirements (if any) of the Director-General under section 101(1), he may after the expiration of a period of six

months beginning with the giving of the notice of appeal request the Director-General in writing to send the appeal forward to the Special Commissioners, and the Director-General shall send the appeal forward accordingly within three months after receiving any such request."

There is no reason why the defendant should not take action under section 102(2) to get his appeal heard by the Special Commissioners. If the Director-General refuses to send the defendant's appeal forward to the Special Commissioners in accordance with the section, the defendant can have recourse to a proper remedy in the court.

On behalf of the defendant it is further submitted that it is too late for the plaintiff to bring this action on the ground that it has been time-barred under section 6(4) of the Limitation Ordinance, which reads —

"An action to recover any penalty or forfeiture of sum by way of penalty or forfeiture recoverable by virtue of any Ordinance or other written law shall not be brought after the expiration of one year from the date on which the cause of action accrued."

As I have pointed out, section 125(2) of the Income Tax Act provides that any penalty on any person under section 113(2) shall be collected as if it were part of the tax payable by that person and that section 103 applies to the penalty. In my opinion, this means that if tax can be collected and recovered at any time without being subject to any law of limitation, the penalty can also be collected and recovered at any time without being subject to any law of limitation. I am not aware of any law which prescribes the time limit within which to recover tax after tax is assessed in proper time, although there is provision limiting the time within which tax can be assessed, e.g. sections 91(1) and 91(2)(b) of the Income Tax Act. One should not confuse the two time limits, i.e. time limit within which to assess tax or penalty and time limit within which to recover tax or penalty after it has been assessed. Since section 6(4) of the Limitation Ordinance is intended to be a general provision applying to penalties generally whereas section 125(2) of the Income Tax Act is intended to apply specifically to penalty under section 113(2) of the Act and since section 125(2) of the Act has been introduced after the enactment of section 6(4) of the Ordinance, in my opinion section 125(2) of the Act prevails over section 6(4) of the Ordinance in so far as penalty under section 113(2) of the Act is concerned.

As regards the plaintiff's claim for the sums of $9,328.35 and $300 being increases arising by virtue of section 103(4), these are increases in the section 113(2) penalty and therefore sections 125(2) and 106 apply to them. Section 106(3) clearly provides that the court shall not entertain any plea that the amount sought to be recovered is incorrectly increased under section 103(4).

In support of the contention that limitation is a good plea counsel for the defendant cited the case of *Government of Malaysia* v. *Ng Song Choon*.[1] It appears that in that case the taxpayer contested the Government's claim for income tax on the ground that the assessment of the tax was made out of time, i.e. after the expiry of the twelve years period prescribed under section 91(1) of the Income Tax Act. The Senior Assistant Registrar gave the defendant unconditional leave to defend on the ground that a triable issue was disclosed. On appeal the High Court upheld the Senior Assistant Registrar's decision. In his judgment Arulanandom J. described the issue raised by the taxpayer in that case as follows:

"It is essentially a legal issue and it falls outside the scope of section 106(3) which only lays down that the courts shall not entertain any plea for the amount of tax to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5). In this case no such plea is being raised before the court and therefore in strictly construing the section the court should not extend it to mean no plea shall be entertained by the court."

From the report it does not appear that attention of the learned judge was drawn to section 99(1) of the Income Tax Act. If that section was referred to him, he might have come to a different conclusion and might have held that the issue raised was an issue to be tried by the Special Commissioners and that the High Court has no jurisdiction to try it in the first instance but only on appeal from the Special Commissioners' decision. With due respect, my own view is that a contention that the assessment of tax was was made out of time in contravention of section 91(1) is a plea that the tax was incorrectly assessed within the meaning of section 106(3).

In the present case I hold that there is no defence to the plaintiff's claim and I accordingly grant an order in terms of the summons.

Claim allowed.

Solicitors: *Sethu, Ghazali & Gomez.*

P.S.W. LTD. v. DIRECTOR GENERAL OF INLAND REVENUE

[A.C.J. (Ajaib Singh J.) June 10, 1981]
[Seremban — Tax Appeal No. 1 of 1979]

Revenue Law — Income Tax — Joint venture — Know-how agreement — Services agreement — Transfer of know-how — Whether consideration for transfer a capital receipt — Payment under services agreement — Whether business income — Double Taxation Relief (India) Order, 1976 — Income Tax Act, 1967.

In this case the appellant company a company incorporated in India, participated in a joint venture for the growing of sugar cane and the manufacture of sugar with the Negeri Sembilan Development Corporation. For such purpose the appellant entered into a know-how agreement and a services agreement. Under the know-how agreement the appellant sold to the Corporation all the processes, formulae, knowledge and technical know-how, the consideration being the allotment of 1,500,000 shares in the Syarikat Gula Negeri Sembilan set up to use the know-how. Under the services agreement the appellant provided agriculture, commercial, technological, scientific and administrative assistance and expertise to the Syarikat for the purpose of setting up the sugar cane plantation and factory. The consideration for the services was the lump sum of $600,000 which was paid by instalments. The appellant's company was registered as a foreign company in Malaysia. The appellant was assessed to income tax and development tax on the consideration under the know-how and services agreement. The appellants appealed to the Special Commissioners of Income Tax. The Special Commissioners held that the law applicable was the Double Taxation Relief (India) Order, 1976. They decided that the consideration for the know-how constituted royalty income under Article 13 of the Order and they confirmed the assessment. The appellant appealed against this decision. With regard